No. 87-5096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

QUINCY WEST

Petitioner,

v.

SAMUEL ATKINS

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE PETITIONER

RICHARD E. GIROUX
Counsel of Record
NORTH CAROLINA PRISONER LEGAL SERVICES, INC.
112 South Blount Street
Raleigh, North Carolina 27601
(919) 828-3508

ADAM STEIN
FERGUSON, STEIN, WATT, WALLAS & ADKINS, P.A.
312 West Franklin Street
Chapel Hill, North Carolina 27514
(919) 933-5300
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. Do prison physicians—whether permanent members of a state prison medical staff, or under contract with the state prison system—act under color of state law for purposes of § 1983 liability in their treatment of state prison inmates?

2. Did a physician who was under contract to provide orthopedic services to inmates at a state prison hospital act under color of state law for purposes of § 1983 in his treatment of a North Carolina state prison inmate?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Quincy West, and defendants Samuel Atkins, Rae McNamara, and James B. Hunt. Samuel Atkins is a physician who was acting under contract to the North Carolina Department of Correction, Rae McNamara is the former head of the North Carolina Division of Prisons, and James B. Hunt is the former governor of North Carolina.

The district court dismissed the claims against defendants McNamara and Hunt and the court of appeals dismissed plaintiff's interlocutory appeal of that order on April 23, 1985. On September 3, 1986, a panel of the Fourth Circuit affirmed the dismissal of defendant Hunt, but vacated the dismissal of defendant McNamara.

In its en banc decision, the Fourth Circuit reaffirmed the district court's dismissals of defendants McNamara and Hunt. Petitioner does not challenge these dismissals and thus defendant Atkins is the only respondent in this case.

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The April 9, 1987 en banc opinion of the Court of Appeals for the Fourth Circuit is reported at 815 F.2d 993, and is reprinted in the Joint Appendix 43-57 (hereinafter cited as "J.A.").

The September 3, 1986 panel opinion of the Court of Appeals is reported at 799 F.2d 923. J.A. 39-41. On November 12, 1986, the Court of Appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the en banc court. J.A. 42.

The June 7, 1985 order of the United States District Court for the Eastern District of North Carolina (Boyle, Terrence W.) has not been reported. J.A. 37-38.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were issued on April 9, 1987. The petition for a writ of certiorari was filed on July 8, 1987 and was granted on October 19, 1987. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner Quincy West, a state prison inmate, suffered a badly torn Achilles tendon on July 30, 1983, while playing volleyball at Odom Prison in Jackson, North Carolina. Petitioner was taken to Woodland, North Carolina, where he was examined by Dr. John H. Stanley, who was under contract to provide medical care to inmates at Odom Prison. Dr. Stanley directed that petitioner be transferred for treatment at Central Prison Hospital in Raleigh, North Carolina. After his transfer on August 9, 1983, petitioner was examined for the first time by respondent, Dr. Samuel Atkins, an orthopedic surgeon employed by Central Prison. J.A. 4-5.

During the times relevant to petitioner's allegations, Central Prison Hospital was a 97-bed acute care hospital facility for the North Carolina Department of Correction's approximately 17,500 inmates. It employed only one full-time staff physician. The remaining dozen or so physicians were employed under contracts for less than full-time employment.

The respondent, Dr. Atkins, was one such "contract" physician. He was employed by the Department of Correction pursuant to a "Contract for Professional Services" under which he provided orthopedic care to inmates at Central Prison Hospital. J.A. 24-26. His duties included the following: to provide two orthopedic clinics per week, to see all orthopedic and neurological referrals, to perform surgery as scheduled, to conduct rounds as often as necessary for his surgical and other orthopedic patients, to coordinate with the physical therapy department, to request the assistance of neurosurgical consultants on spinal surgical cases, and to provide emergency on-call orthopedic services 24 hours per day. J.A. 24-26.

As a natural part of his contractual duties, Dr. Atkins supervised Department of Correction nurses and correctional health assistants during surgery, in his clinics, and on rounds. In addition, Dr. Atkins supervised inmates who worked as scrub technicians and surgical technicians, inmates who cleaned and sterilized instruments, and inmates who worked on each floor in his clinics and during rounds.

For his services, Dr. Atkins was paid $495 per clinic, nearly $1,000 per week, plus additional amounts for each surgery according to a schedule, thus producing income well over $50,000 annually depending on the number of surgeries he performed.[1]

On November 29, 1984, petitioner filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina against respondent Dr. Samuel Atkins, Director of Division of Prisons Rae McNamara, and Governor James B. Hunt, contending the defendants were deliberately indifferent to his serious medical needs for treatment of his torn Achilles tendon. J.A. 3-11. Petitioner complained that Dr. Atkins demonstrated a persistent, hostile indifference to his serious, painful and disabling injury from

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[1] In a contemporaneously pending lawsuit against Dr. Atkins and others challenging the conditions at Central Prison Hospital, Dr. Atkins testified at deposition that his income for his work at Central Prison tremendously exceed what he earned from his private practice, that he made as much as $30,000 annually at Central Prison for performing surgeries above the $50,000 he earned for conducting the clinics, that he spent considerably more time on his prison work than on his private practice and that by the time of this action, his surgical privileges at the Raleigh area hospitals had been withdrawn. *Hammond* v. *Woodard, Atkins, et al.*, Civil No. 84-844-CRT (E.D.N.C., filed July 27, 1984).

the time Atkins first examined petitioner on August 9, 1983 until petitioner brought suit on November 23, 1984, fourteen months later. J.A. 5.

Petitioner's *pro se* complaint revealed the following facts. It identified respondent, Dr. Atkins as "employed as an Orthopedic Surgeon at Central Prison Hospital," J.A. 4, who "had a bad reputation . . . for his . . . surgery and the denial of adequate treatment." J.A. 7. At their first meeting, Dr. Atkins told petitioner that he should be scheduled for surgery to repair the torn Achilles tendon. However, Atkins refused to operate, choosing instead to "experiment" on petitioner with a cast to see whether the injury would heal by itself. He refused petitioner's request for medication to relieve intense pain. Dr. Atkins' attitude towards petitioner was hostile. J.A. 5.

Petitioner next saw Dr. Atkins at the Central Prison Hospital later in August for a new cast after the initial cast disintegrated, and then again in September, 1983 when the second cast was removed. At that time, petitioner's leg was still badly swollen and painful. Atkins refused for a third time to give petitioner medication for his pain. J.A. 5. Petitioner was transferred back to Odom Prison.

Dr. Atkins' experiment had failed. Petitioner's leg remained swollen and painful. On his return to Odom Prison, he complained both about the lack of treatment and unrelieved pain. J.A. 5-6. He went on hunger strikes which resulted in his transfer on November 8, 1983 to lock-up at Central Prison. There petitioner immediately did everything he could to get Atkins to see him and treat him. He wrote to the Warden. He wrote to Atkins "pleading" that he see petitioner and do something for his pain and swollen leg. He complained daily to the nurse on his

cell block about his painful injury. In November, 1983, a psychiatrist saw petitioner's swollen leg and promised that he would be seen by Atkins and given medication or hospitalized, but nothing happened. J.A. 6.

After an additional four months, on January 10, 1984, petitioner was finally taken to the orthopedic clinic where Dr. Atkins briefly examined his swollen and painful leg. Atkins acknowledged that the injury had not healed, but provided no treatment and refused for the fourth time to give petitioner any medication even though petitioner had told him that the pain prevented him from walking. Atkins did prescribe high top tennis shoes, which petitioner never received. J.A. 7.

Petitioner saw Dr. Atkins for what turned out to be the last time on February 15, 1984. The swelling and pain had worsened. Dr. Atkins told petitioner that he would need to see petitioner on a regular basis and that surgery might be required to repair the tendon. J.A. 7-8. Despite acknowledging that petitioner's condition required continued medical attention, Dr. Atkins thereafter refused to see petitioner.

Petitioner continued to seek relief for his swollen leg and pain. Every time he would seek medication for his pain, the physician assistant would schedule him for an appointment with Dr. Atkins, which the doctor would not keep. On March 28, 1984, Nurse Earp examined petitioner's swollen leg and told him that he needed to be seen by Dr. Atkins. The following day Nurse Earp told petitioner that Dr. Atkins had written an order on petitioner's medical records releasing him as a patient and that Dr. Atkins would not see petitioner again. J.A. 8.

Petitioner registered complaints wherever he could. He wrote the Governor at least twice, J.A. 7, 9, the

Director of the Department of Correction at least three times, J.A. 7, 9 and 10, a Captain Curry, J.A. 9, and a Dr. Eppley, who was another physician employed at Central Prison, J.A. 9, all without effect.

On June 1, 1984, he filed a grievance against Dr. Atkins charging that Dr. Atkins had not seen him for three and one-half months despite the many efforts by petitioner and others to schedule appointments for him, that his injury had not healed and that he remained in constant pain. J.A. 9. The June 18, 1984 answer to the grievance promised some hope. "Inmate is scheduled to see Dr. Atkins on 6-21-84." J.A. 9. However, notwithstanding the apparent administrative decision that petitioner would be seen by Dr. Atkins, the order by Dr. Atkins on petitioner's medical records that petitioner would not be seen by Dr. Atkins was obeyed. As with other scheduled appointments to see Dr. Atkins, when the appointed day came, petitioner was not taken to see him.

Instead of seeing Dr. Atkins, a week later petitioner was abruptly transferred back to Odom Prison, away from Dr. Atkins. At Odom, petitioner continued to experience the pain and swelling. When he filed this action in November, 1984, he was still in great pain, he had a "terrible limp," he could not run, jump or squat, and the circulation in his leg was poor. J.A. 10. He prayed for a court appointed expert to examine his leg and foot, an injunction directing that he be provided with medical care other than by Dr. Atkins and for compensatory and punitive damages. J.A. 11.

On December 10, 1984, District Judge Terrence W. Boyle ordered that the claims against defendants Rae McNamara and James B. Hunt be dismissed as frivolous under 28 U.S.C. § 1915(d). That order also held that the "claims against defendant Adkins [sic] are not frivolous, and the plaintiff may proceed against him." J.A. 12.

On April 22, 1985, defendant Atkins filed motions to dismiss and for summary judgment together with affidavits to support his assertion that he did not act under color of state law. J.A. 13-29. On June 7, 1985, the district court allowed defendant Atkins' motion for summary judgment, J.A. 37, holding that Atkins was not acting under color of state law for purposes of § 1983, relying on *Calvert* v. *Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert denied*, 471 U.S. 1132 (1985), which had held that a physician who was employed by a professional association under contract to provide medical services to inmates in the Maryland state prison system was not acting under color of state law for purposes of § 1983 when he provided orthopedic services to inmates.

At the time he ruled on the motion for summary judgment, Judge Boyle had before him: an affidavit by Dr. Atkins stating that he made his own medical decisions according to standards established by the A.M.A., J.A. 22-23; an affidavit by the North Carolina Division of Prisons Director of Health Services, stating that Dr. Atkins was an independent contractor and not a state employee, and that he exercised his own independent medical judgment when providing medical services to inmates, J.A. 27-29; and a copy of Dr. Atkins' "Contract for Professional Services," J.A. 24-26 as described above. The Atkins submissions on his motion for summary judgment did not show the extent, if any, of his non-prison practice or the extent to which Atkins depended upon the prison work for his livelihood.[2]

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[2] The facts regarding the extent of Dr. Atkins' work at Central Prison, his income from his contact with Central Prison, and his dependence on that income developed in another action in the same court, as described in note 1 above, were, of course, not available to this *pro se* incarcerated plaintiff to put before the court in response to

Petitioner filed notice of appeal to the Fourth Circuit on June 17, 1985. On November 18, 1985, the Court of Appeals appointed Richard E. Giroux of North Carolina Prisoner Legal Services, Inc., to represent petitioner.

On appeal, petitioner argued both that *Calvert* was decided wrongly and should be overruled, and that, in the alternative, his case should be distinguished from *Calvert*. On September 3, 1986, a panel of the court of appeals held that a determination of whether Dr. Atkins had been deliberately indifferent to petitioner's serious medical needs should be made before addressing the issue of whether Dr. Atkins was acting under color of state law for purposes of § 1983. The grant of summary judgment to Samuel Atkins and the dismissal of Rae McNamara were vacated, and the case remanded to the district court. J.A. 39-41.

On November 12, 1986, the court of appeals ordered that the decision of the panel be vacated, and set the case for oral argument before the *en banc* court. J.A. 42. On April 9, 1987, a divided court affirmed the district court's dismissal of the claims against McNamara and Hunt and the grant of summary judgment in favor of Atkins. The holding of the court is not altogether clear. It appears to be that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the profes-

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Atkins' motion for summary judgment. Nevertheless, the rule is that "a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) *(quoting Haines* v. *Kerner*, 404 U.S. 519 (1972)).

sional is a full-time employee of the state," J.A. 45, because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46. It may be, however, that the majority held more narrowly "that '[t]hese professional obligations and functions of a private physician establish that such a physician does not act under color of law when providing medical services to an inmate.'" J.A. 42 *(quoting Calvert* v. *Sharp*, 748 F.2d at 863).

Chief Judge Winter, joined by Judges Phillips and Ervin, dissented. Judge Winter expressed the view that prison doctors, "whether permanent members of the prison staff or under limited contract with the prison," J.A. 49-50, act under color of state law in providing medical care to prisoners and that respondent in this case so acted. The dissenters stated that the provision of medical care to prisoners is an exclusive state function and therefore prison doctors providing medical services to prisoners act under color of state law. J.A. 52-54. They also asserted that a prison doctor acts under color of state law because of "the integral role that he plays within the prison medical system . . . ." J.A. 54. The dissenters believed that the rule applied by the majority "would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their independent, professional judgment, they could never be considered state actors - notwithstanding the holding in *Estelle* v. *Gamble*." J.A. 52.

On October 19, 1987, this Court issued its writ of certiorari to review the opinion of the Court of Appeals.

SUMMARY OF ARGUMENT

The Fourth Circuit's holding, that a prison doctor does not act under color of state law when he exercises profes-

sional judgment, is directly contrary to the spirit and the letter of *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The Court held in *Estelle* that "deliberate indifference to a prisoner's serious illness or injury," whether by a prison guard or a prison doctor, constitutes cruel and unusual punishment prohibited by the Eighth Amendment and "states a cause of action under 42 U.S.C. § 1983." *Id.* at 104. This is so because contemporary standards of decency "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103.

An *Estelle* action is a straightforward suit under § 1983 to provide a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961). A prison doctor employed by the state to provide medical services required by the Eighth Amendment is a state official amenable to suit under § 1983.

The majority decision below rest entirely on its erroneous reading of *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the only case in which this Court has determined that a person paid directly by the state who is sued under § 1983 for abusing his position was not acting under color of state law. *Dodson* was an exceptional case producing a limited holding: "[W]e decided *only* that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding." 454 U.S. at 325 (emphasis added).

In *Dodson*, the putative state actor, the public defender, was a public employee fulfilling a function traditionally performed by private lawyers. In performing that role, her professional obligations required her to retain all of the essential attributes of the private lawyer. Those attributes included her "professional independence"

which the state was constitutionally obliged to respect, 454 U.S. at 321-22, and which required her to be adversarial to the state. Thus, this Court concluded that the public defender does not act under color of law when performing the traditional functions of a lawyer representing a client in a criminal case because in that "capacity a public defender is not acting on behalf of the State; he is the State's adversary." 454 U.S. at 322-23 n. 13.

In contrast to a public defender, the prison physician's professional obligations do not make him "the State's adversary." In North Carolina, the relationship between prison doctors and other prison authorities "is a joint effort of correctional administrators and health care providers . . . ." North Carolina Division of Prisons Health Care Manual (hereafter *"Manual"*) § 100.5 (reprinted at p. 7 of appendix attached at conclusion of petitioner's brief, hereafter "App"). "[I]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* A prison doctor serves within the prison together with its whole staff to "provide medical care for those whom [the state] . . . is punishing by incarceration," *Estelle*, 429 U.S. at 103, an activity mandated both by the Eight Amendment and by North Carolina law. N.C. Gen. Stat. § 148-19 (1983)(App. 19). These are services provided to North Carolina prisoners only by the state. The inmate may neither employ nor elect to see a different doctor of his choice.

The general notion of professional independence and integrity which for the Fourth Circuit removes prison doctors from § 1983 purview conflicts directly with other decisions by the Court which have identified professionals as state actors. *See, e.g.*, *Parham* v. *J.R.*, 442 U.S. 584, 606-07 (1979), (at proceedings to commit juveniles to a

mental institution, a professional supplies the required due process of law by exercising his professional judgment; thus the state action is the exercise of professional judgment); *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982) (a professional at a state institution for the mentally retarded is liable under § 1983 for violating constitutional rights of patients "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

Dr. Atkins was fully vested with state authority to fulfill essential aspects of the duty placed on the State by the Eighth Amendment "to provide medical care for those whom it is punishing by incarceration." *Estelle*, *supra*, 429 U.S. at 103. His contract with the state required him to provide regular, substantial orthopedic services at the prison hospital for a large prison population for which he received a base pay of more than $50,000 annually and additional fees for each surgery. He therefore was acting under color of state law in that capacity. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964).

Dr. Atkins' official status and authority at Central Prison was confirmed by the response of other prison officials to Dr. Atkins' orders concerning petitioner. When Dr. Atkins placed an order in petitioner's medical files that petitioner was released from Atkins care and would not be seen by him any more, J.A. 8, that order was obeyed in spite of frequent efforts by various officials to schedule petitioner to be seen by Dr. Atkins for the care of petitioner's injured leg and treatment of his constant pain.

Dr. Atkins acted together with a host of prison officials to withhold needed medical care from petitioner. He

thereby acted under color of state law. "[P]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980); *Tower* v.*Glover*, 467 U.S. 914 (1984); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725-726 (1961). Moreover, the state has "so far insinuated itself into a position of interdependence with [Dr. Atkins] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. at 725.

ARGUMENT

The holding of the Fourth Circuit in this case is not entirely clear. Most likely it is that "a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where . . . the professional is a full-time employee of the state," J.A. 45, because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46. It is also possible that the court more narrowly held, consistent with its earlier decision in *Calvert* v. *Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), which it "decline[d] to overrule," J.A. 47, that Dr. Atkins did not act under color of law because he performed medical services at the prison hospital under a contract for less than full-time employment.[3] In either case, whether Dr.

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[3] The opinion below begins:

> "In *Calvert* v. *Sharp*, 748 F.2d 861, 863 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), we held that '[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate.' Prisoner West brought

Atkins was a permanent member of the state prison staff was irrelevant to the holding below that he was not acting under color of law.

Petitioner contends here that, read broadly or narrowly, the Fourth Circuit decision below was wrongly decided. Every other circuit which has considered the issue has concluded, at least by implication,[4] that prison physicians act under color of state law when treating incarcerated persons.[5] In part I petitioner will show that

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this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish *Calvert*, we affirm the district court's dismissal of the appellant's claim." J.A. 43-44.

[4] This Court in *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 927, referring to its decision in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), stated that: "Each of these cases involved a finding of state action as an implicit predicate of the application of due process standards."

[5] First Circuit: *Miranda* v. *Munoz*, 770 F.2d 255 (1st Cir. 1985) (upheld jury verdict in a § 1983 action against physician, who worked at a jail eight hours per week).

Second Circuit: *Todaro* v. *Ward*, 565 F.2d 48 (2nd Cir. 1977) (affirmed district court judgment against, among others, a surgical consultant at a women's correctional facility in New York).

Third Circuit: *Norris* v. *Frame*, 585 F.2d 1183 (3rd Cir. 1978) (remanded a pretrial detainee's § 1983 claim against, among others, a prison physician).

Fifth Circuit: *Murrell* v. *Bennett*, 615 F.2d 306 (5th Cir. 1980) (upheld § 1983 action by *pro se* Alabama inmate against prison physician for alleged failure to provide proper medical treatment). *See also Robinson* v. *Jordan*, 494 F.2d 793 (5th Cir. 1974) (cited extensively by Judge Winter in his dissent below at J.A. 56).

Sixth Circuit: *Byrd* v. *Wilson*, 701 F.2d 592 (6th Cir. 1983) (upheld § 1983 action challenging the failure of the medical staff, including two

the 'unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976), upon a prisoner by a doctor who is a permanent member of the state prison

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physicians, to provide adequate medical care at a Kentucky State Penitentiary).

Seventh Circuit: *Duncan* v. *Duckworth*, 644 F.2d 653 (7th Cir. 1981) (*pro se* civil rights action against prison hospital administrator allowed to proceed until identity of the members of the medical staff responsible for the alleged delay in treatment could be designated).

Eighth Circuit: *Hall* v. *Ashley*, 607 F.2d 789 (8th Cir. 1979) (remanded for a new trial in § 1983 action against orthopedic physician employed by the Arkansas Department of Correction). *See also Kelsey* v. *Ewing*, 652 F.2d 4 (8th Cir. 1981) (upheld § 1983 action against a physician who provided medical services at a Minnesota prison pursuant to a contract with the Minnesota Department of Correction); *Mullen* v. *Smith*, 738 F.2d 317 (8th Cir. 1984) (inmate's allegations stated an Eight Amendment claim sufficient to survive motion for dismissal; one of the defendants was a prison physician).

Ninth Circuit: *Broughton* v. *Cutter Laboratories*, 622 F.2d 458 (9th Cir. 1980) (upheld *pro se* § 1983 action against, among others, two prison physicians, alleging denial of medical treatment. The court remanded to allow the prisoner to amend his complaint to allege facts sufficient to support an action for deliberate indifference). *See also, Briley* v. *State of Cal.*, 564 F.2d 849, 853, 856 (9th Cir. 1977) (private physician, "while serving as [county] medical examiner and advising at the [plea] bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983") (as cited by Judge Winter in his dissent below in this case at J.A. 53-54).

Tenth Circuit: *Daniels* v. *Gilbreath*, 668 F.2d 477 (10th Cir. 1982) (held that psychiatrist was acting under color of law even though evidence against state hospital psychiatrist insufficient to meet the constitutional standard).

Eleventh Circuit: *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986) (upheld § 1983 action against physician under contract with state to provide medical care to inmates); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985) (upheld § 1983 action against private entity under contract with state to provide prison health services).

staff is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and constitutes action under color of state law which is actionable under 42 U.S.C. § 1983. In part II the petitioner will demonstrate that respondent Dr. Atkins, who was employed under contract by the Central Prison Hospital to provide orthopedic services for prisoners at the prison hospital on a regular but less than full-time basis, acted under color of law when over a fourteen month period he experimented on petitioner instead of performing the surgery he told petitioner was needed, refused to take appropriate steps to repair petitioner's torn Achilles tendon, abruptly ceased seeing petitioner despite acknowledging that petitioner needed continuing orthopedic care, and continuously refused to treat petitioner's severe and constant pain.

I

A PRISON PHYSICIAN WHO IS A PERMANENT MEMBER OF THE STATE PRISON STAFF ACTS UNDER COLOR OF LAW WHEN HE RENDERS MEDICAL CARE TO PRISONERS AND , IF IN SO DOING HE INFLICTS CRUEL AND UNUSUAL PUNISHMENT, HE IS LIABLE TO THE PRISONER UNDER 42 U.S.C. § 1983

A. A Prison Doctor Who Deliberately Denies Medical Care Resulting In Unnecessary Pain And Suffering Thereby Imposes Cruel And Unusual Punishment.

The holding of the Fourth Circuit in this case, that a prison doctor does not act under color of state law when he exercises professional judgment, is directly contrary to both the spirit and the letter of this Court's decision in *Estelle* v. *Gamble*, 429 U.S. 97 (1976). This Court held in that decision that "deliberate indifference to a prisoner's serious illness or injury," whether by a prison guard or a

prison doctor, "states a cause of action under § 1983." *Id.* at 104.

Estelle rested on "elementary principles" of Eighth Amendment jurisprudence, which include the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 102-03 *(quoting Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). These standards "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Id.* at 103. The contemporary standards mandating adequate medical care to people incarcerated by the state, this Court observed, are reflected in modern legislation of the state which codifies the long held common law view, as once expressed by the North Carolina Supreme Court, that: "'It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty care for himself.'" *Id.* at 104 *(quoting Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).[6] As this Court noted, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle*, 429 U.S. at 103. If the failure of the authorities to provide medical treatment results in unnecessary "physical 'torture or lingering death,'" *id.* at 103 *(quoting In re Kemmler*, 136 U.S. 436, 447 (1890)), or unnecessary "pain and suffering which no one suggests would serve any

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[6] The mandate to provide adequate health care is now found in a North Carolina statute, N.C. Gen. Stat. § 148-19 (1983) (App. 19), and in officially promulgated regulations. 5 North Carolina Administrative Code (NCAC) 2E (App. 1-3). The latter states, *inter alia*, "G.S. 148-19, Health Services, specifies that the Department of Correction shall provide health services to prisoners which shall include preventive, diagnostic, and therapeutic measures . . . ." 5 NCAC 2E.0201 (App. 2).

penological purpose," *id.* at 103, then contemporary standards of decency and the Eighth Amendment are offended.

Estelle makes clear that such Eighth Amendment violations could be committed by any prison authority, "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id.* at 104-05. There is no question in *Estelle* that a prison doctor who renders treatment to inmates is a state actor.

The *Estelle* decision followed a large number of lower court opinions evaluating prisoners' medical care claims. *See* 429 U.S. at 104 n. 10, 105 nn. 11-12, 106 n. 14. *Estelle* confirmed the prior understanding that the denial of adequate medical care by prison guards and doctors could offend the Eighth Amendment. *Id.* at 105 nn. 11-12, 104 n. 10. It also confirmed the "essential agreement," that the proper Eighth Amendment standard is the "deliberate indifference" test, which is not satisfied by simple "inadvertent failure to provide adequate medical care," or a "negligent . . . diagnos[is] or treat[ment]." *Id.* at 105-06 (*quoting Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937)).

The import of *Estelle* is that when a prison physician shows that his action was within the range of accepted professional judgment, he has not violated the inmate's Eighth Amendment rights, although he may have acted negligently. This is so because the Court has carefully confined cruel and unusual punishment claims against doctors to instances of deliberate indifference to serious medical needs, and because it has explicitly excluded from the purview of such claims typical instances of medical

malpractice. Indeed, of the several cases which this Court cites as properly holding that a prison doctor's deliberate indifference to an inmate's serious medical needs violates his patient's Eighth Amendment rights, the first listed draws exactly this distinction. *Estelle*, 429 U.S. at 104 n. 10. Claims of constitutional violations are "attributable to 'deliberate indifference . . . rather than an exercise of professional judgment . . . .'" *Id. (quoting Williams* v. *Vincent*, 508 F.2d 541, 544 (2nd Cir. 1974)). In 1983 the Court fashioned an equivalent standard for evaluating substantive due process violations inflicted by doctors and other professionals upon patients at state institutions for the mentally retarded. *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982) ("substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.").

The effect of the Fourth Circuit decision below, however, is to foreclose, as a matter of law, the *Estelle* inquiry into whether a prison doctor was deliberately indifferent or whether he was exercising professional judgment. Instead, the prison physician who is charged with misconduct in the course of his medical treatment may not be sued for inflicting cruel and unusual punishment. He may indeed have been deliberately indifferent under *Estelle*, and yet, because he does not act under color of law by this analysis, he is insulated from suit. Under the Fourth Circuit's rule, even an intentional injury inflicted by a physician could not be redressed pursuant to 42 U.S.C. § 1983.

Only in the Fourth Circuit have prisoners been denied the opportunity to bring Eight Amendment claims against their doctors. In every other circuit, the courts

have continued to recognize such claims under § 1983.[7] Moreover, notwithstanding stringent standards required for proof of an Eighth Amendment medical claim, reports of post *Estelle* cases make clear that such violations may and do occur.[8]

The reasons that medical care in prisons continues to give rise to constitutional claims by prisoners are detailed in the two Amicus Curiae briefs filed in this case. The National Prison Project attributes the existence of deliberately indifferent medical treatment of inmates to "three primary reasons: . . . (1) the political process is unlikely by itself to protect the interests of prisoners in basic health care; (2) the medical care provided prisoners is likely to be isolated from the medical care provided in the community; and (3) market controls on the quality of services do not operate because prisoners uniquely have no option to reject the medical care proffered by the

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[7] *See*, e.g., *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986) and cases listed in note 5 *supra* upholding § 1983 prisoner Eighth Amendment suits against prison doctors.

[8] E.g., *French* v. *Owens*, 538 F.Supp. 910 (S.D. Ind. 1982), *aff'd in rel. part*, 777 F.2d 1250 (7th Cir. 1985); *Green* v. *Carlson*, 581 F.2d 669 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980); *Wellman* v. *Faulkner*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Ramos* v. *Lamm*, 485 F. Supp. 122 (D. Col. 1979), *aff'd in rel. part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Inmates of Alleghany County Jail* v. *Pierce*, 487 F. Supp. 638 (W.D. Pa. 1980); *Lightfoot* v. *Walker*, 486 F. Supp. 504 (S.D. Ill. 1980); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985). The particular acts giving rise to findings of cruel and unusual punishment in these cases are set forth in Amicus Curiae Brief of the American Civil Liberties Union Foundation, the National Prison Project of the ACLU Foundation, and the North Carolina Civil Liberties Union Foundation at Appendix I. (Hereinafter "Amicus Brief of the National Prison Project.")

state." National Prison Project Amicus Curiae Brief, p. 18. The American Public Health Association identifies similar factors: security considerations which permeate health care delivery in prisons; insufficient resources; entaglement of medical staff in custodial functions; the absence of free market regulatory mechanisms. Amicus Curiae Brief of the American Public Health Association, pp. 10-34. The availability of federal forum to inmates operates to ameliorate the consequences of those forces which tend towards producing medical care at an unconstitutional level in prison.

In *Estelle*, the Court explicitly identified "indifference . . . manifested by prison doctors in response to their prisoner's needs," 429 U.S. at 104, as a form of unconstitutionally cruel and unusual punishment and cited examples of just such conduct found by the lower courts. *Id.* n. 10. The decision below purports not to challenge *Estelle* on this basis. Nevertheless, it agrees with petitioner that it "has the effect of limiting the range of professionals subject to an *Estelle* action." J.A. 46. More than this, the effect of this decision is that the doctor who inflicts cruel and unusual punishment does so as a private citizen, not under color of law.[9]

B. A Doctor Who Is A Permanent Member Of The Prison Staff Is An Official Of The State And Acts Under Color Of Law In His Activities As A Prison Physician.

Estelle plainly recognizes that cruel and unusual punishment inflicted in the form of a prison doctor's delib-

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[9] The state of North Carolina regularly moves to dismiss State Tort Claim actions brought by prisoners against "contract" physicians. This includes virtually all such claims, since almost all prison medical care is now provided by doctors working under less than full-time contracts. *See*, e.g., *Jones* v. *N.C. Department of Correction*, TA-9423, N.C. Industrial Commission (1987); *Peterson* v. *N.C. Department of Correction*, TA-10570, N.C. Industrial Commission (1987).

erate indifference to the serious medical needs of his patients is actionable under 42 U.S.C. § 1983: "Regardless of how evidenced, deliberate indifference to a prisoner's illness or injury states a cause of action under § 1983." *Estelle*, 429 U.S. at 104. In so holding, the court merely approved the understanding of all the circuit courts. *Id.* at 106 n.14.

The cause of action identified in *Estelle* is a straightforward application of the firmly established doctrine that a defendant in a § 1983 suit acts under color of law when he abuses the position given to him by the state. That statute provides a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape*, 365 U.S. 167, 172 (1961).[10] Its purpose from inception has been "to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of law, 'whether that action be executive, legislative or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) *(quoting Ex Parte Virginia*, 100 U.S. 339, 346 (1880)).

It is only those authorized by the state to whom the inmate may turn for his medical needs. If the doctor fails

[10] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Monroe* v. *Pape*, 365 U.S. at 184 (1961) *(quoting United States* v. *Classic*, 313 U.S. 299, 326 (1941), *rehearing denied*, 314 U.S. 707 (1941)). The Court has recently recognized § 1983 claims based on allegations that defendants acted under color of law by misuse of state power in a variety of circumstances. E.g., *Dennis* v. *Sparks*, 449 U.S. 24 (1980) (private party acts under color of state law when he corruptly acts in concert with a state judge); *Tower* v. *Glover*, 467 U.S. 914 (1984) (private parties act under color of state law when they act in concert with state officials to obtain plaintiff's criminal conviction).

in treating those needs, the inmate's only recourse is to the State. *Estelle*, 429 U.S. at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."). The State employs doctors to provide prisoners with medical care. By deferring to the professional judgment of its prison doctors, the State has transferred to them its obligations under the Eighth Amendment to render medical treatment within its prisons. When they so act, they do so "clothed with the authority of state law"; they are the "prison authorities" upon whom the prisoner must rely. They act under color of law.

A prison doctor, who is a permanent member of the prison staff, employed by the state to provide medical services, as required by state law and by the Eighth Amendment, is a state official amenable to suit under § 1983. "The involvement of a state official . . . plainly provides the state action[11] essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions . . . were officially authorized or lawful." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Obedient to *Estelle*, all the circuit courts, save the Fourth, have continued to sort out prisoner § 1983 cases according to the standards there announced and have treated prison doctors as acting under color of law. Indeed, all other circuits have treated "private" doctors as acting under color of law when employed by the state to treat those it has incarcerated.

[11] *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 929-932 (1982), resolving some doubt, held squarely that a finding of "state action" fully satisfies the acting under color of state law requirement of § 1983.

C. The Court Below Has Misapplied *Polk County* v. *Dodson* In Ruling That A Prison Doctor Acting In His Professional Capacity Does Not Act Under Color Of Law.

The majority decision below, read narrowly or broadly, rests entirely on its reading of *Polk County* v. *Dodson*, 454 U.S. 312 (1981), the only case in which this Court has determined that a person paid directly by the state who is sued under § 1983 for abusing his position was not acting under color of state law.[12] This was an exceptional case producing a holding limited to its peculiar circumstances: "[W]e decide *only* that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding."[13] 454 U.S. at 325 (emphasis added).

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[12] The facts giving rise to the case are also peculiar as they hardly suggest a colorable constitutional claim even had the public defender acted under color of state law. Richard Dodson was convicted for robbery. Public Defender Shepard was assigned to represent him on appeal. "After inquiring into the case, however, she moved for permission to withdraw as counsel on the ground that Dodson's claims were wholly frivolous," 454 U.S. at 314, following exactly the procedures prescribed for such situations in *Anders* v. *California*, 386 U.S. 738 (1976), and by Iowa appellate rules. 454 U.S. at 314 n. 2. Following notice to Dodson of Shepard's motion and her memorandum setting forth the legal arguments raised by the case, Dodson was allowed 30 days to inform the Iowa Supreme Court that he wanted his appeal considered. If it then found any point "not frivolous", it could then grant Shepard's motion to withdraw and appoint new counsel. *Id.* Shepard's motion was granted and the appeal dismissed. Dodson's § 1983 suit against Shepard alleging that she had deprived him of his right to counsel apparently gave no clue as to what non-frivolous legal argument she should have advanced for him on appeal.

[13] Justice Blackmun in dissent stresses the narrowness of the holding. "In essence, the Court appears to be holding a public defender exempt from § 1983 liability only when the alleged injury is ineffective assistance of counsel." 454 U.S. 312, 337.

Dodson was unusual as a state action case in two respects. First, it presented a putative state actor, the public defender, who was a public employee fulfilling a function traditionally performed by private lawyers.[14] This is just the reverse of the typical state action case, which asks whether a private person or entity is performing traditionally governmental activities or is so interrelated with state activity that the challenged activity is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Second, the public defender, in performing the role historically entrusted to private lawyers, retains all of the essential attributes of the private lawyer as he goes about his tasks. Those attributes include most importantly his "professional independence" which the state is constitutionally obliged to respect. 454 U.S. at 321-22. In *Dodson*, the defendant did not allege that the state interfered with the public defender's independence, nor was this Court willing to assume such interference. "At least in the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)], has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests." 454 U.S. at 322.

As stressed in *Dodson*, the professional independence of a criminal defense lawyer requires him to be adversarial to the state. "'[A]n indispensable element of the effective performance of his responsibilities is the ability to act

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[14] [S]tate employment is generally sufficient to render the defendant a state actor . . . ." *Lugar, supra*, 457 U.S. at 935-36 n. 18; "where the defendant is a government employee, this inquiry is relatively straightforward." *Blum* v. *Yaretzky*, 457 U.S. 991, 1013 (1982) (Brennan, J. dissenting).

independently of the Government and to oppose it in adversary litigation.'" 454 U.S. at 319 n. 8 *(quoting Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979)). Thus, this Court concluded that the public defender does not act under color of law when performing the traditional functions of a lawyer representing a client in a criminal case because in that "capacity a public defender is not acting on behalf of the State; he is the State's adversary." *Dodson*, 454 U.S. at 322-23 n. 13.

The professional obligation of the criminal defense lawyer to oppose the state is central to the criminal justice system. In a criminal prosecution, it is the state which investigates the case; it is the state which prefers the charges against the defendant; it is in the state's name that the charges are brought; and it is the state which vigorously prosecutes the defendant seeking his conviction. The defendant faces the state through his lawyer, whose undivided loyalty is to the defendant:

> In our system a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client."

Id. at 318-19. Given the range of "adversarial functions"[15] performed by a defense lawyer, the Court found "it peculiarly difficult to detect any color of state law in such

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[15] "[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants." *Polk County* v. *Dodson*, 454 U.S. 312, 320 (1981).

activities." *Id.* at 320. These are the reasons that *Dodson* is the only decision by this Court holding that a state employee performing her assigned tasks was not acting under color of law.

In contrast to a public defender, a prison doctor treating inmates is not engaged in activities traditionally performed by private parties. As this Court noted in *Dodson*, in addition to their "traditionally private obligations" to their patients, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve." *Id.* A prison doctor serves within the prison together with its whole staff to "provide medical care for those whom [the state] . . . is punishing by incarceration," *Estelle*, 429 U.S. at 103, an activity mandated both by the Eighth Amendment and by North Carolina law. N.C. Gen. Stat. § 148-19 (1983) (App. 19). These are services provided to North Carolina prisoners only by the state. The inmate has no choice. He may neither employ nor elect to see a different doctor.[16]

Nor do the physician's professional obligations set him in conflict with the state and other prison authorities. He is not "the State's adversary." *Dodson*, 454 U.S. at 322-23 n. 13. In North Carolina, the relationship between prison doctors and other prison authorities is the opposite of adversarial; it is a relationship of collaboration. The North Carolina Division of Prisons Health Care Manual declares that "[t]he provision of health care is a joint effort of

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[16] In some circumstances, minimum custody prisoners may be able to request outside health services at their own expense. Inmates such as petitioner in maximum, close or medium custody have no such opportunities. N.C. Division of Prisons Health Care Manual § 710 (App. 17-18) promulgated pursuant to 5 NCAC 2E.0200 (App. 2-3) and N.C. Gen. Stat. §§ 148-11; 148-19 (App. 19).

correctional administrators and health care providers and can be achieved only through mutual trust and cooperation."[17] Judge Winter noted similar policy statements promulgated by the American Medical Association describing a prison doctor's relationship with other prison authorities.[18] Not only is the doctor's relationship with other prison officials cooperative, but it may also affect medical decisions. *Dodson*, 454 U.S. at 320.[19] ("Institutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve."). Insofar as a state-employed attorney is analogous to a state-employed doctor, then, the more apposite decision on this issue is not *Dodson*, but *Tower* v. *Glover*, 467 U.S. 914 (1984) (public defender acts under color of state law when he acts in concert with state officials to sustain defendant's criminal conviction).

The majority below concluded that a full-time physician without custodial or supervisory duties does not act under color of state law. In reaching this conclusion, the majority did not find any functions adversarial to the state in the professional obligations of a prison physician. Instead, it found a broad overriding principle in *Dodson* that professionals as a class do not act under color of state law when acting in their professional capacities because "[w]here the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured." J.A. 46.[20]

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[17] *Manual* § 100.5 (App. 7), promulgated pursuant to 5 NCAC 2E.0200 (App. 2-3) and N.C. Gen. Stat. §§ 148-11; 148-19 (App. 19). The North Carolina Department of Correction regulations describe a coordinated, cooperative system of health care with the ultimate "responsibility on the Director, Division of Prisons to provide each inmate the medical, dental, and mental health services necessary to maintain basic health," 5 NCAC 2E.0201 (App. 2), and with the responsibility for the delivery of health services at each facility on the warden or institution head who is to appoint a specific "health authority." 5 NCAC 2E.0202 (App. 2). The institution head and the health authority are to meet at least quarterly, 5 NCAC 2E.0205 (App. 3), and health policies are to be reviewed annually. 5 NCAC 2E.0206 (App. 3). The health "services must be provided in keeping with the security regulations of the facility." 5 NCAC 2E.0205 (App. 3).

[18] "[T]he American Medical Association Standards for Health Services in Prisons (1979) . . . prescribe the relationship between medical personnel and other prison officials as one of 'close cooperation and coordination'; a joint effort.' Preface at i; Std. 102 & Discussion." J.A. 51-52.

[19] There are other important differences between a lawyer serving as a public defender and a doctor as a prison physician. The latter works inside the publicly owned and maintained prison hidden behind fences, walls and gates. He is working with and for the prison officials, and is accountable only to them. The public defender, by contrast, is constantly under the eye of an independent judiciary before whom he is regularly appearing. Unlike the prisoner, who can only complain to the State, his doctor's employer, the public defender's clients are free to complain to the courts about him and to seek his removal from the case. Such complaints and requests are often made and are regularly and seriously considered by the courts. When cause appears, new counsel is appointed. *See*, e.g. Rule 104, Iowa Rules of Appellate Procedure, in *Dodson*, 454 U.S. at 314 n. 2. No equivalent policing mechanism exists for prisoners dealings with prison doctors.

[20] The majority below also found support for its view in the *Dodson* Court's discussion of *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) and *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The *Dodson* opinion does point out that *O'Connor* involved claims against a psychiatrist who served as the superintendent at a State mental hospital, and that *Estelle* involved a physician who was the medical director of the Texas Department of Correction and also the chief medical officer of a prison hospital. However, *Estelle* did not turn on the supervisory role of the doctor there; the complaint was premised on the medical treatment given. *See Estelle*, 429 U.S. at 103, 104 n. 10 (citing with approval several court of appeals decisions upholding claims of delib-

As developed above, *Dodson* turns on the particular professional obligation of the criminal defense lawyer to be the adversary of the state, not some general, sweeping notion of professional independence and integrity applicable to all professionals. The idea that all professionals are removed from § 1983 purview when acting in their professional capacities conflicts directly with other decisions by the Court which identified professionals as state actors. For example, in *Parham* v. *J.R.*, 442 U.S. 584, 606-07 (1979), the Court held that the commitment of a juvenile to a state mental hospital by her parents or by the state involves state action entitling the child to procedural due process in the form of a professional evaluation of the child by a staff physician. In that circumstance the physician, acting within his professional capacity, acts for the state in providing the due process which is constitutionally required of the state. He is plainly a state actor acting under color of state law. cf. *Dennis* v. *Sparks*, 447 U.S. 24 (1980); *Tower* v. *Glover*, 467 U.S. 914 (1984) (state judge acts under color of law).

State action is also implicated in the decisions of a doctor at a state institution for the mentally retarded. In

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erate indifference without any mention of supervisory and custodial duties). *See also*, *Dodson*, 454 U.S. at 330-31, 331 n. 2 (Blackmun J., dissenting) (noting that claims in *Estelle* and *O'Connor* were unrelated to the custodial and supervisory functions of the doctors there). The doctors' custodial and supervisory functions were not at issue. "The *Polk [Dodson]* Court discussed the custodial and supervisory functions of the doctors in *Estelle* and *O'Connor* simply to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state." J.A. 51. (Chief Judge Winter, dissenting). Moreover, as we show below, prison doctors in general and Dr. Atkins in this case perform such functions and act in concert with other supervisors and custodians.

Youngberg v. *Romeo*, 457 U.S. 307 (1982), the Court held that a patient at such an institution "retains [due process] liberty interests in safety and freedom from bodily restraint," although such interests are not absolute. *Id.* at 319-20. The doctor or other professional at such a state institution is liable for violating those constitutional rights "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. Thus the state is constitutionally obliged to exercise professional judgment in matters of patient restraint and safety. If the professional's decision is flawed, tested by the Court's standard, then he, acting for the state, is liable for the constitutional violation.

The Fourth Circuit's explicit drastic limitation on *Estelle*, J.A. 43-47, is inconsistent with *Dodson* and well established state action doctrine. As such, it should be rejected.

II

A PHYSICIAN, EMPLOYED UNDER A CONTRACT BY THE STATE TO PROVIDE REGULAR, SUBSTANTIAL BUT LESS THAN FULL TIME ORTHOPEDIC SERVICES AT A PRISON HOSPITAL AND TO BE ON CALL 24 HOURS EACH DAY FOR EMERGENCIES FOR WHICH HE RECEIVES BASE PAY OF MORE THAN $50,000 ANNUALLY AND ADDITIONAL FEES FOR EACH SURGERY, ACTS UNDER COLOR OF STATE LAW IN TREATING PRISONERS.

We have shown in part I above that a physician who is a permanent member of a state prison medical staff acts under color of law when he provides or withholds medical care to prisoners and is responsible to them under § 1983 if he should inflict cruel and unusual punishment. Thus

the broad doctrine advanced by the majority below which would remove professionals from § 1983 coverage is wrong. In this part we show that the Fourth Circuit's narrower holding in *Calvert* v. *Sharp*, 748 F.2d 861 (1984), alternatively applied to this case, J.A. 44, 47, is also wrong. Dr. Atkins acted under color of state law in his treatment of petitioner because he was in fact clothed with the authority of the state and because he acted in concert with other prison authorities in treating petitioner.

A. In Serving As Petitioner's Doctor, Dr. Atkins Acted Under The Authority Granted To Him By The State To Fulfill Its Constitutional Obligation To Provide Medical Care For Prisoners; His Action Was State Action.

The fact that Dr. Atkins' employment contract "did not require [him] . . . to work exclusively for the prison", J.A. 50 (dissent), does not make him any less of a prison official than if he performed those duties as a permanent member of the state prison medical staff. He worked regularly as a doctor at the prison hospital fully invested with State authority to fulfill essential aspects of the duty placed on the State by the Eighth Amendment "to provide medical care for those whom it is punishing by incarceration." *Estelle*, *supra*, 429 U.S. at 103. The Fourth Circuit acknowledges that the formal designation of the employment relationship does not determine whether Dr. Atkins acted under color of state law. "Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties." J.A. 47. "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1964).

An examination of Dr. Atkins' position within the prison system's "total health care delivery system," *Manual* § 100.3 (App. 5-6), shows clearly that his action is state action rendering him amenable to suit under § 1983. To understand Dr. Atkins' duties under his contract, it is helpful to know something of the prison system's total health care system. The hospital, which is behind the prison walls at Central Prison in Raleigh, North Carolina, is the acute care facility for a prison population of about 17,500 inmates. Prisoners are transferred to Central Prison for hospitalization from throughout the system on the orders of medical staff at the local units. *Manual* at § 207 (App. 11-13).

Prisoners are also bused into Central Prison from outlying units for appointments at twelve specialty clinics; the Orthopedic Clinic is held on Tuesdays and Thursdays. *Id.* at § 208 (App. 14-15). The specialist conducting the clinic "[f]requently" schedules the inmate to be brought back to the clinic at some time in the future for further treatment or reevaluation. He indicates the date for return on the prisoner's health records and the local unit returns the prisoner to the clinic on that schedule. *Id.* at § 208.3 B (App. 15). It is the physicians who determine when inmates are to be transferred for medical reasons and the method of transportation. *Id.* at § 209 (App. 16).

Central Prison Hospital was a 97 bed acute care facility, staffed by one full-time doctor and other doctors employed on non-exclusive bases to conduct the twelve special clinics and care for the hospitalized prisoners.

Physicians write medical orders "instruct[ing] health care personnel to carry out a specific treatment or medical procedure on a given patient." *Id.* at § 204.4 (App. 10). Nurses, physician assistants, physical therapists, other

health care workers and prison personnel are subject to the physicians' orders. J.A. 24, 28.

Dr. Atkins played an important part in fulfilling North Carolina's obligations under *Estelle* to its total prison population. He was the orthopedist for the entire prison system and provided twice weekly Orthopedic Clinics prescribed by the Health Care Procedures Manual. J.A. 24; *Manual* at § 208 (App. 14-15). He performed the orthopedic surgery at Central Prison Hospital required for North Carolina prisoners. J.A. 24. He examined all orthopedic and neurological referrals. *Id.*[21] He made regular rounds at Central Prison Hospital on his post-operative and other orthopedic patients "as often as necessary to insure patient's [sic] progress to recovery." *Id.* He coordinated with the Physical Therapy Department, and ordered the physical "therapy necessary to restore function." *Id.* He was available "24 hours per day for emergency orthopedic evaluations or surgery." *Id.* His contract required him to furnish at least two days per week of his time in the performance of these duties. J.A. 25. The record does not show that Dr. Atkins conducted a private practice apart from his work at the prison.[22]

[21] He apparently saw neurological as well as orthopedic referrals because the system did not have a separate neurological clinic or regularly employ a neurosurgeon. *See Manual* at § 208 (App. 14-15).

[22] The record in this case, comprised of affidavits submitted by Dr. Atkins when he sought summary judgment, is silent on the question of Dr. Atkins' practice outside his state employment. Since the burden was on Atkins to demonstrate that he was entitled to judgment as a matter of law and since he was opposed by a *pro se* incarcerated plaintiff, all inferences arising from the record's silence concerning the amount of time Dr. Atkins devoted to his work at Central Prison Hospital or the amount of time he may have spent seeing private patients should be drawn against Atkins and in favor of petitioner. As we have noted above, Dr. Atkins testified in a deposition in another case in the same district court that he spent considerably more time on his prison work than on his private practice and that his income from his prison work tremendously exceeded that derived from his private practice. n. 1, *supra*. The court in *Davenport* v. *Saint Mary Hosp.*, 633 F. Supp. 1228 (E.D. Pa. 1986), refused to grant defendant's motions for summary judgment against a *pro se* litigant where all the facts material to a state action determination were not yet before the court.

For his work at Central Prison Hospital, Dr. Atkins was paid at the rate of $495 per clinic and additional fees, according to a schedule, for each surgery. J.A. 25. This translates to a base pay of $51,480 for providing two clinics for 52 weeks. The record does not reveal Dr. Atkins' additional prison earnings for his surgeries.[23]

The foregoing facts show Atkins is fully "clothed with the authority of state law," *United States* v. *Classic*, 313 U.S. 299, 326 (1941), to perform the State's *Estelle* duties. His work was regular, ongoing and substantial. He carried out his duties at the state prison within the prison hospital. North Carolina designated him to serve as the orthopedist for the 17,500 people incarcerated in its prisons. The state authorized him to issue orders to other medical and prison personnel to provide for the medical care of the prisoners in the clinics and the hospital. As in the petitioner's experience, those orders were followed. The state authorized him to issue orders to schedule prisoners for appointments at the orthopedic clinic and for admission to the hospital. Other prison personnel carried out his orders. "[W]hen the state gives a select individual

[23] At his deposition in the *Hammond* case, he testified that he received as much as $30,000 annually for his surgeries in addition to money he was paid for the orthopedic clinics.

. . . powers that are traditionally exercised by the state[24] and not possessed by the general citizenry, a person exercising these powers . . . may therefore be deemed a state

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[24] We emphasize in this part of our argument the governmental nature of Dr. Atkins' work to show that he was in reality a state official even though his employment agreement with the prison permitted him to practice medicine privately to the extent he had time to do so consistent with his contractual duties in the prison. Most of the same facts also provide the basis for a finding, which the dissenters made below, J.A. 52-54, that he acted under color of state law under "the public function" doctrine:

> Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." *Blum* v. *Yaretzky*, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs . . . [it is] the *government's obligation* to provide medical care for those whom it is punishing by incarceration . . . '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle*, 429 U.S. at 103-04 (emphasis added) (citations omitted).

J.A. 52.

Judge Winter emphasized that although medical care in general is not within the exclusive prerogative of the state, it is exclusive to the state "in the *prison context*, where the state has complete control over the circumstances and sources of a prisoner's medical treatment." J.A. 53. Other courts have also concluded that private doctors providing medical care to those the state has incarcerated perform a "public function" so as to be subject to § 1983 liability. *Ort* v. *Pinchback*, 786 F.2d 1105 (11th Cir. 1986); *Ancata* v. *Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985); *Davenport* v. *Saint Mary Hospital*, 633 F.Supp. 1228 (E.D.Pa. 1986); *Lombard* v. *Eunice Kennedy Shriver Center*, 556 F.Supp. 677 (D.Mass. 1983). Petitioner agrees with those views and submits that he is entitled to relief for those reasons. He has chosen to rely primarily on the related but simpler arguments that Dr. Atkins is a state official and contends that he acts in concert with other state officials since the facts seem so clearly to support state action under those less complicated doctrines.

actor." *Davenport* v. *Saint Mary Hosp.*, 633 F. Supp. 1228, 1237 (E.D. Pa. 1986).[25] In *Griffin* v. *Maryland*, 378 U.S. 130 (1964), a privately employed policeman who had been deputized by the state to exercise state police power acted for the state when he exercised those powers even though he was not an employee of the state and was not paid by the state.[26] Here Dr. Atkins was invested with important state powers, was hired by the state and paid

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[25] As in *Davenport*, the district court in *Lombard* v. *Eunice Kennedy Shriver Center*, 556 F. Supp 667, 680 (D.Mass. 1983) found state action where the state assigned state powers to a private entity and the private entity accepted those powers:

> Under the circumstances of this case, it would be empty formalism to treat the Shriver Center as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. § 1983. Whether a physician is directly on the state payroll, as in *O'Connor*, or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the Shriver Center, and because Shriver voluntarily assumed that obligation by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.

[26] See also the several cases cited by the Court in *Davenport*, 633 F.Supp. at 1237:

> *Jennings* v. *Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) (holding that a private citizen who was appointed an assistant special prosecutor was clothed with the authority of state law); *Kay* v. *Benson*, 472 F.Supp. 850, 851 (D.N.H. 1979) (finding that New Hampshire's civil commitment statute gave the defendant physician the power of detention, a power historically reserved to the state, thereby clothing him with state authority); *Hill* v. *Toll*, 320 F.Supp. 185, 186-87 (E.D.Pa. 1970) (holding that because a state statute accorded bail bondsmen the privilege to arrest, a privilege not given to the general public, the state had placed its imprimatur on their conduct.)

by the state. He acted under color of state law when he acted under the authority the state had given him.

Dr. Atkins' official status and authority at Central Prison is confirmed by the response of other prison authorities to Dr. Atkins' directions concerning petitioner. When Dr. Atkins placed an order in petitioner's medical files that petitioner was released from Atkins' care and would not be seen by him any more, J.A. 8, that order was obeyed. Physician assistants regularly scheduled petitioner for appointments with Dr. Atkins when petitioner complained to them about his pain. *Id.* Dr. Atkins did not keep the appointments. *Id.* Nurse Earp sought to schedule petitioner for treatment by Dr. Atkins of his badly swollen and painful leg, but when he discovered Atkins' order, he obeyed it. *Id.* Petitioner wrote letters to the Governor, the Director of Prisons and other prison officials seeking orthopedic care. Atkins' order was not disturbed. *Id.* Petitioner filed a formal grievance with the authorities. J.A. 9. They responded that petitioner had been scheduled to see Dr. Atkins on June 21, 1984. J.A. 9. That administrative determination was also overridden by Dr. Atkins' order: petitioner was neither taken to see Atkins on June 21, 1984, nor ever again. Atkins was invested with the state's power, which he exercised and abused, to withhold orthopedic treatment from petitioner entirely, treatment petitioner was completely dependent upon the state to provide.[27] Dr. Atkins was able to withhold needed medical treatment from petitioner only because the state gave him that power and other officials respected his power. He acted under color of law.

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[27] See note 16 *supra*.

B. Dr. Atkins Acted Under Color Of Law Because He Willfully Participated In Joint Action With Prison Officials In Withholding Medical Care From Petitioner.

The argument that Dr. Atkins was not a state actor because he was not a permanent member of the prison staff must be set aside, since the record plainly shows that he acted willfully with state officials in denying petitioner needed medical care. Probably the least controversial strand of state action doctrine is the rule that "private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis* v. *Sparks*, 449 U.S. 24, 27-28 (1980); *Tower* v. *Glover*, 467 U.S. 914 (1984); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States* v. *Price*, 383 U.S. 787, 794 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725-726 (1961). *See also*, *Briley* v. *State of California*, 564 F.2d 849, 858 (9th Cir. 1977) (private physician who engaged in joint action with state officials and others to perform surgery on plaintiff resulting in the infliction of cruel and unusual punishment acted under color of state law).

We have detailed in the preceding section, II A., how Dr. Atkins acted together with a host of prison officials to withhold needed medical care from petitioner. This joint denial of medical care occurred from the last time Dr. Atkins saw petitioner on February 15, 1984, when he told petitioner that he would have to follow petitioner regularly because the injury had not healed and surgery might be needed, until at least June 28, 1984 when petitioner was transferred to Odom Prison. The various physician assistants, Nurse Earp, and other prison authorities including the grievance representatives recognized petitioner's need for orthopedic care and sched-

uled appointments for petitioner with Dr. Atkins. When the appointed day and hour would arrive, those responsible for taking him to Dr. Atkins' clinic would never come for him. They cooperated with and acquiesced in Dr. Atkins' order that he would not see petitioner. Moreover, by not otherwise arranging for orthopedic care the prison authorities knew petitioner needed, they tacitly carried out Atkins' course of deliberate indifference.

It is true that the record before the district court on Dr. Atkins' motion for summary judgment does not show particular agreements between prison authorities and Dr. Atkins or particular actions by them in withholding orthopedic care from petitioner. It is known, however, that Dr. Atkins worked as an integral part of a "total health care delivery system", Manual § 100.3 (App. 5-6), that "[t]he provision of health care [in the North Carolina prison system] is a joint effort of correctional administrators and health care providers", *Id.* § 100.5 (App. 7), that as a physician within the system, Dr. Atkins is granted the power to issue orders "instruct[ing] health care personnel to carry out a specific treatment or medical procedure on a given patient," *id.* at § 204.4 (App. 10), and that the period when medical care was being withheld as described above extended over four months. In these circumstances, Dr. Atkins' submissions on his motion for summary judgment were inadequate to defeat petitioner's claim that Dr. Atkins was jointly engaged with state authorities and therefore amenable to suit under § 1983. The circumstantial evidence of understandings and agreements between the public authorities and the allegedly private defendant is more complete here than it was in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144. There the Court said: "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any

material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." 398 U.S. 144, 157. The Court further stated that summary judgment should not have been granted in that case because "[r]espondent here did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served." *Id.* Here Dr. Atkins did not even attempt to refute petitioner's claim that Dr. Atkins "reached an understanding with some [prison] employee that petitioner not be [afforded medical care]." Thus Dr. Atkins' motion for summary judgment should have been denied.

Finally, Dr. Atkins and the prison authorities function in a "symbiotic relationship" which enables the prison medical department "to carry out its primary public purpose . . .,"[28] to provide medical care to its prisoners. He works with them in "a joint effort". Manual § 100.5 (App. 7). As we have seen, the state has "so far insinuated itself into a position of interdependence with [Dr. Atkins] that it must be recognized as a joint participant in the challenged activity . . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. at 725. The state depended on Dr. Atkins to fulfill the state's obligation under the Eighth Amendment and under state law to provide orthopedic care to its prisoners as needed; Dr. Atkins depended upon the state for virtually all of his livelihood. Dr. Atkins and the state were joint participants in providing medical care to inmates

[28] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 175 (1972), describing the relationship between the lessee restaurant and the parking authority in *Burton* v. *Wilmington Parking Authority, supra.*

and in withholding medical care from petitioner.

CONCLUSION

The judgment of the court of appeals should be reversed with instructions that the district court's grant of summary judgment in favor of respondent Atkins be vacated and the case remanded to the district court.

Respectfully, submitted

RICHARD E. GIROUX
Counsel of Record
NORTH CAROLINA PRISONER
LEGAL SERVICES, INC.
112 South Blount Street
Raleigh, North Carolina 27601
(919) 828-3508

ADAM STEIN
FERGUSON, STEIN, WATT,
WALLAS & ADKINS, P.A.
312 West Franklin Street
Chapel Hill, North Carolina 27514
(919) 933-5300
Counsel for Petitioner

APPENDIX

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 5—DEPARTMENT OF CORRECTION

CHAPTER 2—DIVISION OF PRISONS

SUBCHAPTER 2A—
ORGANIZATION AND PERSONAL CONDUCT

DATE ISSUED: JULY 1987.

.0201 Statutory Responsibility

G.S. 148-19, Health Services, specifies that the Department of Correction shall provide health services to prisoners which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis for all types of patients. In compliance with the statue, the Director, Division of Prisons is charged with the responsibility to provide each inmate the medical, dental, and mental health services necessary to maintain basic health.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0202 Facility Responsibility

The delivery of health services at each facility is the responsibility of the warden, institution head, or superintendent of that facility. The warden, institution head, or unit superintendent will designate in writing a specific health authority who is charged with the responsibility to provide health services to that facility. The health authority may be a physician, a physician extender, or a health administrator. He may be a full time employee or a contractual services provider. The responsibility of the health authority includes arranging for all levels of health care and assuring quality of and inmate access to all health services. The duties of the health authority will be included in a written agreement, contract, or job description.

History Note: Statutory Authority G.S. 148-11; G.S. 148-19;
Effective February 1, 1978
Amended Effective September 23, 1980.

.0203 Staff Responsibility

The Director of the Division of Prisons shall have on his staff a Chief of Health Services who will be responsible to plan, organize, and coordinate a total health delivery system which includes medical, mental, and dental health services for all

inmates within the North Carolina Division of Prisons. The Chief of Health Services will be responsible to develop and maintain in a current state a health care procedures manual which will implement the health care policies of the Division of Prisons.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0204 Clinical Responsibility

Matters of medical, dental, and mental health involving clinical judgment are the sole province of the responsible physician, dentist, psychiatrist, or qualified psychologist respectively. However, these services must be provided in keeping with the security regulations of the facility.

History Note: Statutory Authority G.S. 148-11, 148-19
Effective February 1, 1976
Amended Effective September 23, 1980.

.0205 Meetings And Reports

The warden, institution head, or unit superintendent of each facility will meet with the responsible health authority for his facility at least quarterly. It will be the responsibility of the health authority to report to the warden, institution head, or unit superintendent on matters dealing with the delivery of health services. The report should include such topics as the effectiveness of the health care system for that facility, description of any health environment factors which need improvement, changes effected since the last reporting period, and, if appropriate, recommendations for corrective action. A copy of this report will be provided to the Chief of Health Services. The responsible health authority will also submit an annual statistical summary in compliance with procedures developed by the Chief of Health Services.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective September 23, 1980.

.0206 Annual Review

Each health care policy and procedure will be reviewed at least annually by the responsible health authority at each facility and by the Chief of Health Services. The policy and procedures document will bear the date of the most recent review or revision and the signature of the reviewer.

History Note: Statutory Authority G.S. 148-11; 148-19
Effective September 23, 1980.

NORTH CAROLINA

DIVISION OF PRISONS

HEALTH CARE PROCEDURE MANUAL

These procedures implement the Health Care Policy established by Section 5NCAC 2E .0200 of the North Carolina Division of Prisons Policy and Procedures Manual.

Recommendations for changes, additions, or deletions should be submitted through channels to the Chief of Health Services for appropriate action.

/s/ Ralph D. Edwards, Director
RALPH D. EDWARDS, DIRECTOR
N. C. Division of Prisons

DATE ISSUED: MAY 1, 1980

This project was supported by a Law Enforcement Assistance Administration Grant awarded by the Governor's Crime Commission, North Carolina Department of Crime Control and Public Safety pursuant to the Omnibus Crime Control and Safe Streets Act of 1968 as amended.

OVERALL RESPONSIBILITIES

100.1 Division Responsibility

The Director, Division of Prisons, is charged with the responsibility to provide each inmate the medical, dental, and mental health services necessary to maintain his basic health.

100.2 Facility Responsibility

The delivery of health services at each facility is the responsibility of the warden, institution head, or superintendent of that facility. The warden, institution head, or unit superintendent will designate, in writing, a specific individual with the responsibility for providing health services to his facility. This individual may be a health administrator, a physician, or a physician extender. He may be a full time employee or a contractual service provider. If the designated individual is other than a physician, a physician will also be identified who will be responsible for clinical judgments. The duties of the responsible health authority will be specified in a written agreement, contract, or job description.

100.3 Staff Responsibility

The Director, Division of Prisons, shall have on his staff a Chief of Health Services whose job it will be to plan, organize, and coordinate a total health delivery system which includes medical, mental, and dental health services for all inmates incarcerated within the North Carolina Division of Prisons. He will have staff responsibility to:

A. Develop and maintain a medical plan in a current state,

B. Make Recommendations for health care staffing for each facility,

C. Assist in recruiting health care personnel and participate in the selection process of key providers,

D. In coordination with institution heads and unit superintendents, determine medical equipment requirements and execute staff responsibility to assist in the procurement of equipment,

E. Make recommendations for facility design to allow for the delivery of health services,

F. Prepare a Division training program for all health professionals within the system,

G. Execute staff responsibility for the preparation of the Health Services budget,

H. Coordinate with other state agencies to facilitate continuity of care and to acquire services wherever possible that are not available within the Division of Prisons,

I. Execute contractual arrangements with health providers as appropriate,

J. Prepare federal grant requests to acquire additional resources for health delivery whenever appropriate,

K. Conduct staff visits to institutions and field units and make recommendations to the responsible officials for improvements in service delivery,

L. Recommend to the Director, Division of Prisons, policies and/or procedures which specifically address the delivery of health services,

M. Prepare and submit to the Director, Division of Prisons, an annual report of health services for the preceding year.

100.4 Consultants

Individuals trained in the following disciplines will be appointed in writing by the Director, Division of Prisons, to serve as consultants to the Chief of Health Services:

A. Physician as Chief Clinical Director,

B. Psychiatrist,

C. Dentist,

D. Clinical Psychologist,

E. Physician Extender,

F. Registered Nurse,

G. Registered Records Administrator,

H. Radiologist or Certified Radiology Technician,

I. Pharmacist,

J. Diet Therapist,

K. Medical Technologist or Certified Laboratory Technician.

100.5 Matters of Clinical Judgment

The provision of health care is a joint effort of correctional administrators and health care providers, and can be achieved only through mutual trust and cooperation. Matters of medical, dental, and mental health treatment involving clinical judgments are the sole province of the responsible physician, dentist, psychiatrist, or qualified psychologist respectively. However, these services must be provided in keeping with the security regulations of the facility.

INITIAL SCREENING

200.1 General

To insure continuity of care, intake screening shall be performed by trained staff on all inmates including transfers immediately upon arrival at the facility and before placement in the general population or housing unit. The findings of this screening shall be recorded on the Form DC-435.

200.2 Screening

Screening shall include at least the following items:

A. Inquiry as to whether or not they presently are being treated for a health problem, if they are presently on medication, if their medication accompanied the transfer, or if they have any health complaints at the time of receipt at the unit.

B. Observation of the inmate's behavior, general appearance, conduct, any obvious mental disorders, state of consciousness, evidence of any physical deformities, physical abuse or trauma.

C. Designate on the Form DC-435 what disposition was made of the inmate immediately after the screening process. Disposition can include housing with the general population, housing with the general population and a health provider notified, or a referral to an appropriate health provider on an emergency basis.

200.3 Training

The responsible health authority for the facility will insure that the screening officers designed by the unit superintendent are trained in the health screening process.

200.4 Disposition

The Form DC-435 will be filed in the Outpatient Health Record upon completion of the initial screening process.

204.1 General

Treatment by health care personnel other than a physician, dentist, or other independent provider (such as an optometrist or a podiatrist) must be performed pursuant to written, standing, or direct orders. Physician Assistants and Nurse Practitioners may practice within the limits of state law and regulations promulgated by the North Carolina Board of Medical Examiners.

204.2 Standing Orders

Standing medical orders must be approved and signed by the responsible physician or other personnel authorized by law to write medical orders. They are directives for health professionals to provide definitive treatment of identified conditions and for on site emergency treatment. Each order will contain at least the condition, treatment, and referral data is applicable. Standing orders will be a mutual agreement between local unit nursing personnel and the unit physician.

204.3 Sample Set of Standing Orders

A recommended set of standing orders is indicated below. Each unit physician should review these standing orders and change them according to his treatment preference. The resulting orders must then be signed by the applicable physician and made available to the health care staff.

ABRASIONS AND SUPERFICIAL LACERATIONS:
Clean with Betadine (Providone-iodine) or Phisohex Solution
Mycitracin Ointment (Triple Antibiotic Ointment)
Sterile Dressing
0.5cc Tetanus Toxoid IM if not received within the past 12 months
Other: _____

BURNS, FIRST AND SECOND DEGREE:
Clean with Betadine (providone-iodine) and iced water as tolerated X 20 minutes
Silvadene Ointment, fluff dressing
Refer to Physician Extender or M.D.
Other: _____

BURNS, THIRD DEGREE:
As above
Call Physician Extender or M.D.
Other: _____

DYSPEPSIA:
Antacid liquid or tablets, i.e. Maalox, Mylanta, etc.
Other: _____

DIARRHEA:
Kaopectate 30cc qid X 2 days
Liquid diet
Other: _____

SEVERE ABDOMINAL PAIN WITH FEVER:
Refer to Physician Extender or M.D.
Other: _____

CONSTIPATION:
Milk of Magnesia 30 cc po stat
Other: _____

**PHYSICIAN EXTENDER: Physician Assistant, Family Nurse Practitioner

Physician Signature

Physician Extender Signature (if applicable)

204.4 Direct Orders

A direct order is a signed order by the responsible physician, or other personnel authorized by law or regulation to write medical orders, written in the individual health record. This order instructs health care personnel to carry out a specific treatment or medical procedure on a given patient.

204.5 Protocols

For the purpose of these procedures, protocols apply only to Physician Extenders. A protocol is a more formal method of analyzing and dealing with a symptom complex or disease process. Protocols allow for more flexibility of treatment and are utilized as standing orders between a physician and physician assistant or nurse practitioner. All protocols must be registered with and approved by the North Carolina Board of Medical Examiners. A suggested approved text that may be used is "Patient Care Guidelines for Family Nurse Practitioners" by Hoole, Greenberg, and Pickard. Little, Brown & Co., Boston, Massachusetts.

207.1 General

Female offenders and male offenders 17 years old and younger will be provided hospitalization in local community hospitals as determined by the attending physician. These procedures pertain to male inmates who are 18 years old or older. The condition of the patient as determined by attending physician shall be the criteria as to whether an inmate is hospitalized locally or is transferred to Central Prison Hospital for hospitalization.

207.2 Local Hospitalization

Whenever an inmate is hospitalized in a facility outside the Division of Prisons, the following information will be reported by telephone to the Health Services Office on the

first workday following the day hospitalization commenced:

A. Inmate's name and number

B. Unit

C. Name of hospital

D. Admission diagnosis

E. Name of physician

F. Date of hospitalization

This information is communicated by the Office of the Chief of Health Services to Central Prison Hospital so that the medical staff can communicate with the attending physician in the community hospital to arrange for his transfer to Central Prison Hospital as soon as medically permissible. When it is decided that the patient can be transferred to Central Prison, the means of transportation, i.e., ambulance, van, etc., will be as determined by the attending physician. Every effort will be made to obtain a discharge summary or record of treatment from the discharging hospital. That record will accompany the patient to Central Prison Hospital.

207.3 Central Prison Hospitalization

1. Routine Admissions. When it is determined that an inmate has a condition requiring hospitalization that can be accommodated at Central Prison on a scheduled basis, clearance for this action will be achieved by calling Central Prison (919/828-2361 X 276, 277, 278, or 279). A Form DC-164 must be completed, signed by the unit physician or physician extender, and accompany the patient to Central Prison. Special care will be taken to insure that information indicating treatment rendered at the unit and current medication is shown on the DC-164. Normally, this type of patient will be transported by prison bus on Tuesdays or Thursdays. The Outpatient Health Record must be forwarded with the Form DC-164.

2. Emergency Admissions. Inmates requiring emergency treatment will be accepted at Central Prison

Hospital at any time of the day or night. Emergency referrals may be requested by the unit nurse, custodial personnel, or the unit physician. The following information must be provided by telephone at the time of referral to insure that appropriate speciality care is available:

A. Name of person calling and unit

B. Patient's name and number

C. Patient's status (safekeeper, PSD, felon, misdemeanant)

D. Ambulatory or stretcher case

E. Diagnosis and current medication, if any

F. Estimated time of arrival.

3. Mental Health Referrals. Inmates scheduled for hospitalization for mental health reasons will be referred as provided in paragraph 402.3 of these procedures.

207.4 Specialty Hospitalization

Whenever an inmate has a condition requiring treatment beyond the capability of Central Prison Hospital, appropriate arrangement will be made with community hospitals to acquire necessary care. Central Prison Hospital's health care manual will include specific instructions as to how these arrangements will be made. The decision as to the requirement for specialty hospitalization will be a clinical decision made by the attending physician.

Specialty hospitalization for male inmates seventeen (17) years old and younger will be arranged for by the contractual physician serving Western Correctional Center. Specialty hospitalization for female offenders will be arranged for by the contractual physician serving the North Carolina Correctional Center for Women. Specific procedures as to accomplishing these arrangements will be included in the health care manual for each of the above mentioned facilities.

208.1 General

When the attending physician determines that the patient has a condition which requires treatment by a specialist, such treatment must be made available.

208.2 Local Resources

Specialty care for male inmates 17 years old and younger and for female offenders will be acquired through the use of local specialty clinics or by arranging for the specialist to come into the facility to hold clinics. The physician extender, in coordination with the contractual physician, will determine the most efficient method to acquire specialty care for Western Correctional Center and Correctional Center for Women. If the patient is male, 18 years old or older, a determination will be made by the referring physician as to whether the condition is of such an emergency nature that the services of a local specialist are required. If such is the case, treatment will be obtained in the local community. If the condition of the patient is such that he can be transported to Central Prison Hospital for this care, arrangements will be made for him to be seen at the appropriate specialty clinic at Central Prison Hospital.

208.3 Central Prison Hospital Specialty Clinics

A. Clinic Schedules

Inmates scheduled for treatment by the following specialty clinics should be transferred on the days indicated:

1. Medical - Tuesday or Thursday
2. Surgical - Tuesday or Thursday
3. Mental Health - Tuesday or Thursday
4. Dental - Tuesday or Thursday
5. Eye - Tuesday
6. Neurology - Tuesday
7. Ear, Nose & Throat - Thursday
8. Orthopedics - Tuesday or Thursday
9. Urology - Tuesday or Thursday
10. Endodontics - Tuesday
11. Dermatology - Tuesday

12. Oral Surgery - Tuesday or Thursday

Care must be taken to conform to the above schedule to preclude an unnecessary waiting period at Central Prison and the inefficient use of bed space at that facility. A completed form DC-164 must be placed in the inmate's Outpatient Health Record which must accompany the patient.

208.3 B. Call Backs

Frequently after an inmate has been in a clinic or following hospitalization, the attending physician wants him to return for re-evaluation. The inmate's Outpatient Health Record or discharge summary will show when his presence is required and a memorandum will be forwarded to his unit reaffirming or changing his appointment. Adhere to the scheduled return dates since the inmate is placed on the schedule indicated in his record.

209.1 Medical Decision

The method of transporting an ill or injured patient is a medical decision.

209.2 Procedure

When the attending physician or his designated health professional determines that an emergency medical vehicle or an ambulance is necessary to transport an ill or injured inmate, such transportation will be made available. Each unit will include within their written medical procedures the actions necessary to acquire emergency medical or ambulance services. The number of accompanying security personnel will be determined by the officer in charge.

OBTAINING HEALTH SERVICE OUTSIDE OF THE DIVISION OF PRISONS

710.1 General

There are cases when an inmate wishes to obtain health services from sources outside the Division of Prisons at his

own expense or paid for from family funds or private health insurance resources. There are also instances when it is appropriate to acquire health services from the Veterans Administration or specific services funded by Vocational Rehabilitation by extending the limits of the place of confinement.

710.2 Own Expense

To acquire medical services at an inmate's own expense, the following conditions must be met:

A. The applicant must be in minimum custody. These procedures do not apply to inmates in maximum, close, or medium custody levels.

B. The unit physician must determine that the applicant is in need of the requested treatment.

C. The applicant will provide a statement indicating the type of service requested and the source of funds. The clinician who will provide the services must indicate to the unit superintendent the approximate cost and certify that the Division of Prisons is excused from any liability incurred as a result to the treatment.

D. The unit superintendent will ascertain that the inmate has sufficient funds available and that there are no custody risks involved in obtaining these services outside the Division of Prisons.

E. Minimum custody inmates who have been admitted as inpatients to a Division of Prisons inpatient facility will be allowed to acquire outside medical services at their own expense only if so referred by their attending physician.

710.3 Application

Applications will be submitted on form DC-397 to the unit superintendent who will forward such application to the Chief of Health Services recommending approval or disapproval of each request. Upon completion of action by the Chief of Health Services, one copy of the DC-397 will be returned to the unit and one copy will be retained in the Health Services Section.

Requests for outside dental care and special eyeglasses at an inmate's own expense are exceptions to the above policy. Such requests may be approved or disapproved by the unit superintendent without processing a form DC-397. In these cases, the unit superintendent must be assured that there is no custody risk involved and that the provider of the services will not hold the Division of Prisons liable for any costs incurred.

710.4 Extend Limits of Confinement

Under the provisions of G.S. 148-4, the Secretary of Correction of his designee may extend the limits of confinement of an inmate to acquire medical services not otherwise available. There are occasions when it is appropriate for an inmate to receive medical services from the Veterans Administration, Vocational Rehabilitation, or from a specific hospital funded by his own resources or personal health insurance. In these cases the inmate must request such services and the unit physician must determine that the applicant is in need of such services. The unit superintendent will determine that the Veterans Hospital, Vocational Rehabilitation facility, or community hospital will provide services as requested by the inmate. The unit superintendent will request approval to utilize these outside resources from the Chief of Health Services. Upon approval by the Chief of Health Services, the unit superintendent may request extention of the limits of confinement to allow for the provision of such services. Extension of the limits of confinement must be approved by an area administrator, institution head, or his designee. Limits of confinement will not be extended beyond the geographic boundaries of the State of North Carolina for the purpose of receiving medical services.

§ 148-19. Health services.

(a) The general policies, rules and regulations of the Department of Correction shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients. A prisoner may be taken, when necessary, to a medical facility outside the State prison system. The Department of Correction shall seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners.

(b) Upon request of the Secretary of Correction, the Secretary of Human Resources may detail personnel employed by the Department of Human Resources to the Department of Correction for the purpose of supervising and furnishing medical, psychiatric, psychological, dental, and other technical and scientific services to the Department of Correction. The compensation, allowances, and expenses of the personnel detailed under this section may be paid from applicable appropriations to the Department of Human Resources and reimbursed from applicable appropriations to the Department of Correction. The Secretary of Correction may make similar arrangements with any other agency of State government able and willing to aid the Department of Correction to meet the needs of prisoners for health services.

(c) Each prisoner committed to the State Department of Correction shall receive a physical and mental examination by a health care professional authorized by the Board of Medical Examiners to perform such examinations as soon as practicable after admission and before being assigned to work. The prisoner's work and other assignments shall be made with due regard for the prisoner's physical and mental condition.

(d) The Commission for Mental Health, Mental Retardation and Substance Abuse Services shall prescribe standards for the delivery of mental health services to inmates in the custody of the Department of Correction. The Commission for

Mental health, Mental Retardation and Substance Abuse Services shall give the Secretary of Correction an opportunity to review and comment on proposed standards prior to promulgation of such standards; however, final authority to determine such standards remains with the Commission. The Secretary of the Department of Human Resources shall designate an agency or agencies within the Department of Human Resources to monitor the implementation of such standards by the Department of Correction. The Secretary of Human Resources shall send a written report on the progress which the Department of Correction has made on the implementation of such standards to the Governor, the Lieutenant Governor, and the Speaker of the House. Such reports shall be made on an annual basis beginning January 1, 1978. (1917, c. 286, s. 22; C.S., s. 7727; 1925, c. 163; 1933, c. 172, s. 18; 1957, c.349, s. 10; 1967, c. 996, s. 4; 1973, c. 476, s. 133; c. 1262, s. 10; 1977, c. 332; c. 679, s. 7; 1981, c. 51, s. 6; c. 707, ss. 1, 2.)